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October 2, 1996

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Mr. Donald H. Gips, Chief
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Mr. Richard Smith, Chief
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Federal Communications Commission
2000 M Street, NW, Suite 480
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF TECHNOLOGY

William Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: *CD Radio Request for Pioneer's Preference, PP-24*

Dear Messrs Gips, Smith and Kennard:

Satellite CD Radio, Inc. ("CD Radio") would like to comment for the record in response to statements of Digital Satellite Broadcasting Corporation ("DSBC")¹ that CD Radio and/or the Commission may have acted improperly in this proceeding. Specifically,

- the Commission properly and without discrimination forwarded CD Radio's patent grants to the peer review panel;²

¹ Letter from Diane S. Killory, Counsel for Digital Satellite Broadcasting Corporation to Donald H. Gips, Chief, International Bureau, FCC (Sept. 26, 1996) ("DSBC Letter"). CD Radio's application meets the technical requirements for a pioneer's preference and the recently raised objections are either technically incorrect or wholly irrelevant to a preference decision. See CD Radio's separate letter filed today.

² *Id.* at 3.

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- CD Radio, and the Commission, have thoroughly complied with the FCC's *ex parte* rules;³ and
- CD Radio did not mislead the agency nor file any incorrect statements in its September 17, 1996 letter to the Commission.⁴

First, although the issue is now moot,⁵ the Commission was legally correct in sending the panel the materials CD Radio requested. Unlike DSBC's request to augment the record with recently-created technical arguments,⁶ CD Radio's request was limited to documents that were either already a part of the Commission's official record or were patents issued and published by the U.S. Patent and Trademark Office.⁷ Under the "Official Notice" doctrine, these government documents were fully eligible for consideration by the Commission (and, by extension, the panel) without their prior inclusion in the record.⁸

³ *Id.* at 2 n.1.

⁴ *Id.* at 3 n.4.

⁵ The Commission has now permitted any DARS applicant to file comments or materials by October 2, 1996, for forwarding to the panel. DSBC's materials will thus be presented to the panel, making its assertion of unfair treatment moot.

⁶ *See* DSBC Letter at 2.

⁷ Of course, those documents are now in the record and can be expected to be fully commented upon by other parties in their October 2, 1996 filings.

⁸ The Official Notice doctrine allows an administrative agency to take notice of commonly acknowledged facts whether or not those facts are included on the official record. 4 Jacob A. Stein et al., *Administrative Law*, at 25-2 & 25-3 (Sept. 1995). Official Notice is similar to the doctrine of Judicial Notice, except that Official Notice is broader. *Id.* "Any matter capable of being judicially noticed is capable of being officially noticed." *Id.* at 25-3 n.4 (citing *Dayco. Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966)). The doctrine is codified in the APA, which expressly permits agencies to supplement an official evidentiary record with "Official Notice of a material fact not appearing in the evidence in the record." *See* 5 U.S.C. § 556(e) (1994). Section 1.354 of the Commission's rules includes identical permissive language. *See*

It is well established that Federal government records,⁹ reports, and regulations are properly the subject of Official Notice.¹⁰ For example, Courts frequently use the closely related doctrine of Judicial Notice to consider the existence of, and substance of, patents issued by the Patent and Trademark Office.¹¹ The Commission itself has frequently taken Official Notice of government documents not already part of the FCC's own record.¹² Thus it was entirely

47 C.F.R. § 1.354.

⁹ 9 Wright and Miller, *Federal Practice and Procedure* at 573-74 (1995).

¹⁰ Stein et al. at 25-13 & 25-14.

¹¹ See, e.g., *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 664 n.12 (7th Cir. 1995) (noting that the court can take Judicial Notice of patents), *cert. denied*, 116 S. Ct. 1044 (1996); *Pepitone v. American Standard, Inc.*, 983 F.2d 1087, 1087 n.1 (Fed. Cir. 1992) (noting that the court may take Judicial Notice of published patents under Federal Rules of Evidence 201(b) & (c)); *Vitek Systems, Inc. v. Abbott Laboratories*, 675 F.2d 190, 192 n.4 (8th Cir. 1982) (taking Official Notice of trademark registrations and noting that courts may take Judicial Notice of Patent and Trademark Office documents); *Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir.) (taking Official Notice of U.S. patents), *cert. denied*, 400 U.S. 878 (1970); *Feathercombs, Inc. v. Solo Prods. Corp.*, 306 F.2d 251 (patents may be Judicially Noticed by discretion of the court), *cert. denied*, 371 U.S. 910 (1962).

¹² See, e.g., *Roy M. Speer*, 3 Comm. Reg. (P & F) 363 (1996) (taking Official Notice of Form 10-K Annual Report filed with the SEC); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, 10 FCC Rcd 13038 (1995) (taking Official Notice of information contained in documents published by the Missouri Secretary of State's office); *Radio Lake Geneva Corporation*, 7 FCC Rcd 5586, 5591 (1992) (noting that it is consistent with the provisions of the APA, 5 U.S.C. § 556(e) to take official notice of an FAA "no hazard" determination); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcasting Stations*, 7 FCC Rcd 5489, 5490 n.6 (1992) (taking official notice of 1990 U.S. Census data); *Tucson Community Broadcasting, Inc.*, 4 FCC Rcd 6316 (1989) (taking Official Notice of FAA letters and forms with respect to inspection of a tower); *Lee Optical and Associated Companies Retirement and Pension Fund Trust*, 103 FCC 2d 794, 811 (1985) (taking Official Notice of a Form 10-K, and an amendment to a 10-K filed with the SEC); *Capital Cities Cable, Inc.*, 1985 FCC LEXIS 3057, at ¶ 13 (1985) (taking Official Notice of tax data included on a FERC Form

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appropriate and consistent for CD Radio to request that the Commission send the company's patents to the review panel for inclusion in its deliberations. Given the distinctions between patents subject to official notice, and DSBC's new technical filing, it was fair for the Commission to submit the patents to the panel for consideration and not to submit DSBC's arguments.¹³

Second, DSBC's inability to ascertain the requirements of the Commission's *ex parte* rules has not created "inequities" in this proceeding. The procedural posture of the various pioneer's preference requests has always been clear. The applications remained unrestricted for *ex parte* purposes up until recently, when the Commission invoked its discretionary authority under the rules to place *ex parte* restrictions on further communications. Public Notice DA 96-1650 (Sept. 30, 1996). The clarity of the procedural posture of these proceedings was underscored by the text of the notice itself which confirms that "no parties have formally opposed" CD Radio's preference applications,¹⁴ but that the applications should be considered restricted "hereinafter."¹⁵

Therefore, DSBC errs in intimating that CD Radio violated *ex parte* restrictions by failing to serve DSBC with copies of its correspondence with the Commission. There were no service obligations in this docket until it became restricted upon issue of the public notice. DSBC was not a party to CD Radio's preference application and, thus, CD Radio had no obligation to serve DSBC with its filings. Moreover, CD Radio's correspondence was readily available in the Commission's public files. Under the rules, DSBC was obligated to check those routinely to keep abreast of filings in this proceeding.

1); *Cable Information Services, Inc.*, 81 FCC 2d 383, 389 (1980) (taking Official Notice of information contained in a document published by the U.S. Dept. of Energy).

¹³ The significance of any objection with respect to the *reliability* of CD Radio's published patents would appear to be *de minimis*. Furthermore, the FCC sent copies of its transmittal letter covering the patents to all the applicants and reopened the record, thus mooting any procedural objection.

¹⁴ According to the rules, no *ex parte* restrictions or disclosure requirements exist in an adjudicative proceeding that is not formally opposed. See 47 C.F.R. § 1.1204(a); 47 C.F.R. § 1.1208(c).

¹⁵ This finding effectively repudiates DSBC's claim that its March 1, 1993, comment on the satellite DARS allocation rulemaking somehow made the proceeding restricted.

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Third, CD Radio objects to DSBC's assertion that CD Radio somehow included "misleading" and "incorrect" statements in its September 17th letter to the Commission. In the letter, CD Radio stated that:

[o]n June 13, 1993, in response to an FCC request, CD Radio filed a supplemental application for a pioneer's preference. Two other SDARS applicants filed their own pioneer's preference applications. All parties had an opportunity to file pioneer's preference applications and comments regarding these applications *during the allotted periods provided by FCC Rule*. At no time in this process did any party file an opposition to any of the SDARS applications for pioneer's preference.¹⁶

DSBC suggests that this statement is either "misleading" or "incorrect" but, as discussed above, the simple fact is that CD Radio's statement is wholly accurate. No party ever formally opposed CD Radio's preference application and no party ever opposed any of the supplements, which were filed on well-known dates. The Commission's September 30, 1996, Public Notice clearly states that no party formally opposed the pending preference requests. CD Radio's statement is thus both entirely clear and accurate.

Lastly, CD Radio would like to state that every entity, including DSBC, has had ample rounds of FCC comment cycles during which to apprise the Commission of its views. CD Radio's application has now been pending for nearly *six and one half years*. Its pioneer's preference application has been on public comment at least twice, over a period of nearly 5 years, and apparently will be subject to comment yet again this fall. Moreover, the Commission has undertaken a review of the preference applications far beyond what the law requires. Originally, the FCC convened a panel of internal engineering experts to review all pending satellite DARS preference applications. Following that review, the agency convened a second review panel consisting of non-Commission employees. Such a process is called for in the pioneer's preference statute,¹⁷ but *not for applications accepted for filing by September 1, 1994, as CD*

¹⁶ Letter from Richard E. Wiley, Counsel to Satellite CD Radio, Inc., to Richard Smith, Chief, Office of Engineering and Technology, FCC, at 1 (Sept. 17, 1996) (emphasis added).

¹⁷ See 47 U.S.C. § 309(j)(13)(D).

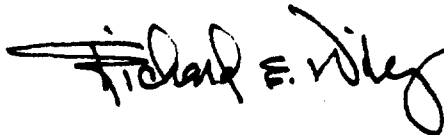
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*Radio's was.*¹⁸ The Commission's use of this extraordinary process was not required, and its imposition certainly did not favor CD Radio.

CD Radio respectfully suggests that procedural fairness now calls upon the Commission to bring the review panel process and its own consideration of the three satellite DARS applications for a pioneer's preference to a just and expeditious conclusion.

This letter does not relate to technical issues and need not be sent to the panel. CD Radio addresses the substantive claims of the competing applicants in other materials filed this day.

Respectfully submitted,



Richard E. Wiley
Counsel for CD Radio Inc.



Peter K. Pitsch
Pitsch Communications

cc: John Stern, IB (5 copies)
Rosalee Chiara, IB
Ronald Repasi, IB
Rodney Small, OET
Peter Tenhula, OGC
Daniel Phythyon, OLIA
All parties to PP-24

¹⁸ 47 U.S.C. § 309(j)(13)(D)(iv).